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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. [redacted] 123

BERNARD H. DANIEL,
Petitioner and Appellant Below,

v.

UNITED STATES OF AMERICA,
Respondent and Appellee Below.

PETITION FOR [illegible]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No.

BERNARD H. DANIEL,
Petitioner and Appellant Below,

Vs.

UNITED STATES OF AMERICA,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE HARLAN FISKE STONE, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your Petitioner respectfully shows:

I.

Summary Statement of the matters involved:

November 23rd, 1939, in the day-time, Petitioner was driving his automobile containing 15 cases of whiskey, *south* on U. S. Highway 71 by-pass, about 4 miles south of Lee's Summit, Missouri, when he was arrested by a state highway patrolman and turned over to agents of the Federal Alcohol Tax Unit who procured this petitioner's indictment under the *Liquor Enforcement Act of 1936, 27 U. S. C. A., Section 223,* on a charge of attempting to transport intoxicating liquors into Kansas, a "dry" state, without permit so to do. Petitioner was tried by the district court on his written stipulation waiving trial by jury, and was found guilty, and appealed to the Eighth Circuit in its case No. 11,846.

The Government there confessed error for reasons not here material and Petitioner was re-tried in the district court. By stipulation, the Government was permitted to prove its case by offering the narrated testimony of its witnesses at the first trial, as recited in the Bill of Exceptions in case No. 11,846. The Petitioner offered no testimony in his own behalf, moved for a directed verdict which was refused, and was again found guilty, and again appealed to the Eighth Circuit, where his conviction was affirmed, *Daniel* v. *United States,* 127 F. (2d) 1, in case No. 12,120. By order of the Eighth Circuit the transcript in the first appeal was made part of the Record on the second appeal, and so the transcripts in both cases are here filed. References to the transcript refer to case No. 11,846 which contains the testimony, unless otherwise noted.

The Government proved that Petitioner purchased the liquor in East St. Louis, Illinois; that he lived at Emporia, Kansas, and had lived there with his family for some time; that he told the arresting officers he was on his way to Houston, Texas, with the liquor. The Government also proved by its witnesses that shortly before his arrest Mr. Daniel had actually gone to Houston, Texas, where he had procured license plates for his car (which were on it when he was arrested), Texas driver's license, and had bought a Federal liquor stamp designating him as a liquor dealer at Houston, Texas, and that he had announced his intention of removing to Houston to enter the liquor business there, shortly before his arrest. The Government also showed he had Kansas driver's license, and Kansas license plates were inside his car.

U. S. Highway 50 runs southwesterly from East St. Louis, Illinois, to Emporia, Kansas; Petitioner was arrested when traveling south on Highway 71 by-pass, about 4 miles south of its intersection with Highway 50; the by-pass leads south into Highway 71 and thence to Houston, and Mr. Daniel was actually driving in that direction when arrested.

The Government's proof of intent was purely circumstantial and it offered, over Petitioner's objections, testimony of statements alleged to have been made by Petitioner when arrested to the effect that about two weeks before the date of his arrest he had taken another load of whiskey to Texas and that he and his sister-in-law had consumed it there. The Government then produced Petitioner's sister-in-law who testified that he had not brought any liquor to her home in Houston. The trial court held that the evidence complained of was both competent and prejudicial. The Eighth Circuit held that the

reception of incompetent evidence would not be prejudicial in a trial by the court and failed to pass on the competency of the evidence complained of, although the Eighth Circuit's opinion leans heavily on inferences unfavorable to the defendant based on the incompetent evidence.

Petitioner contends:

(a)

That the Court erred in admitting, over his objections, any evidence of his statements regarding the previous load of whiskey, such evidence being both incompetent and prejudicial.

(b)

Since all of the competent evidence in the Record is as consistent with the hypothesis of innocence as with guilt, it was the duty of the trial court to sustain his motion for acquittal.

(c)

His motion for acquittal should have been sustained because the Government failed to prove that the whiskey being transported by him was not accompanied by a permit.

(d)

His conviction is based on inference built on inference and presumption built on presumption, and is not supported, as a matter of law, by any evidence.

(e)

By reason of the foregoing his conviction is not supported by any competent evidence.

II.

STATEMENT OF BASIS OF JURISDICTION

The jurisdiction of this Court is invoked under *Section 240 of the Judicial Code* as amended by Act of Congress February 13th, 1925, Ch. 229, 43 Stat. 938 (28 U. S. C. A. 347).

The judgment of affirmation sought to be reviewed was rendered on April 15th, 1942, and the motion for rehearing was denied May 7th, 1942 (R. case No. 12,120, pp. 22-27); this petition is filed within thirty days from May 7th, 1942.

The following cases, it is believed, sustain the jurisdiction of this Court to issue its Writ of Certiorari:

United States v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129, where it is held that where a defendant's motion for directed verdict at the conclusion of the case was denied by the district court, which action was affirmed by the Circuit Court of Appeals, and where the defendant argued before the Supreme Court that there was no substantial evidence to sustain the conviction, a question of law was raised entailing an examination of the Record not for the purpose of weighing the evidence, but only to ascertain whether there was competent and substantial evidence fairly tending to sustain the verdict.

Lilienthal's Tobacco v. *United States,*
97 U. S. 237; 24 L. Ed. 901.
Potter v. *United States,*
155 U. S. 438, 15 S. Ct. 144, 39 L. Ed. 214.
Davis v. *United States,*
160 U. S. 469, 16 S. Ct. 353, 40 L. Ed. 499.

III.

QUESTIONS PRESENTED

I.

Is a defendant to be denied a ruling on the competence of evidence, which the trial court held was prejudicial, merely because he has waived a trial by jury? Here the trial court held the evidence complained of to be prejudicial to the defendant (R. 24, 27). The Eighth Circuit failed to rule our complaint as to its competency and so denied us the full and equal protection of the law.

II.

Is not the substantial evidence in this record as consistent, as a matter of law, with the hypothesis of innocence as with that of guilt?

III.

Does all of the substantial competent evidence in this Record sustain the conviction?

IV.

Does the substantial competent evidence in this Record sustain a conviction without building inference on inference and presumption on presumption?

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

We sincerely believe this case presents special and important reasons touching judicial discretion for the granting of the writ:

I.

The law affords equal protection to all, and it should be the policy of the law to encourage the waiver of jury trials in the interest of expediency and economy. The Eighth Circuit, by refusing to rule the competency of the evidence complained of, denied us the full and equal protection of the law for it could not have evaded such a ruling if the case had been tried to a jury, and so, by its failure to rule the competency of the evidence, penalized the defendant. If its action is to be upheld, then no defendant can safely waive a trial by jury. This presents an important question of Federal law which we believe has not, but should be, settled by this Court.

II.

The opinion of the Eighth Circuit conflicts with that of the Ninth Circuit in *Oras et al* v. *United States,* 67 Fed.

(2d) 463, where that Court rejected incompetent evidence in determining that there was not sufficient substantial evidence without it, to sustain the conviction under review by it.

III.

On this Record, all of the substantial evidence is as consistent with innocence as with guilt, and it was the duty of the Eighth Circuit to reverse the judgment of conviction, and its failure so to do conflicts with the rulings of the Sixth Circuit in *Harrison* v. *United States,* 200 Fed. Rep. 662.

IV.

In this Record, there is no substantial evidence at all which supports the conviction, and it was the duty of the Eighth Circuit to reverse the judgment, but it failed so to do, and its ruling is in conflict with the rulings of this Court in

Wiborg v. *United States,*
163 U. S. 632, 16 S. Ct. 1127, 41 L. Ed. 289;
Clyatt v. *United States,*
197 U. S. 205, 25 S. Ct. 429, 49 L. Ed. 726;
Edenfield v. *United States,*
(Fifth Circuit) 112 F. (2d) 931.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this Court for its review and determination

on a day certain therein named a full and complete transcript of the Record and proceedings in the case of *Bernard H. Daniel, Appellant,* v. *United States of America, Appellee, No. 12,120,* to the end that this cause may be reviewed and determined by this Court as provided for in the Statutes of the United States, and that said decree and judgment of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court and that of the District Court reversed, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

SAM MANDELL,

Attorney for Petitioner.

Brief In Support of Petition For Writ of Certiorari

OPINIONS BELOW

The recital of the United States District Court for the Western District of Missouri, Western Division, delivered August 7, 1940, by Honorable Merrill E. Otis, Judge, is set forth at pages 22-25 of the Record. Recital of the same court in overruling motion for new trial is set forth at pages 26-28 of the Record.

The memorandum opinion and judgment of the District Court for the Western District of Missouri, Western Division, Honorable Merrill E. Otis, Judge, delivered July 31, 1941, is found at pages 3-4 of the Record in case No. 12,120.

The opinion of the Circuit Court of Appeals for the Eighth Circuit, delivered by Sanborn, Judge, is set forth at pages 19-22 of the Record in case No. 12,120, and is reported in 127 Fed. (2d) 1.

JURISDICTION

This Petition is filed within thirty days of May 7, 1942, the date on which the petition for rehearing was denied by the Eighth Circuit. The jurisdiction of the Court is invoked under *Section 240 (a) of the Judicial Code* as amended by the Act of February 13, 1925; 43 Stat. 938.

STATEMENT OF THE CASE

A summary statement of the facts is given in the Petition, pages 1 to 5 above.

STATUTES INVOLVED

This case involves the *Liquor Enforcement Act of 1936,* 27 U. S. C. A., Sec. 223, 49 Stat. 1928, C. 815, Sec. 3.

SPECIFICATIONS OF ERROR TO BE URGED

I.

The Court erred, in admitting, over the objections of the defendant, evidence of statements alleged to have been made by the defendant, concerning a load of whiskey supposedly purchased by him at Alton, Illinois, about November 15, 1939, and supposedly taken by him to Houston, Texas, and supposedly consumed there by the defendant and his sister-in-law, said evidence being incompetent, irrelevant and prejudicial.

II.

The findings, verdict and judgment of the Court are not supported by the Record.

(a)

All of the substantial evidence is as consistent with innocence as with guilt, and it was the duty of the trial court to sustain our motion for acquittal.

(b)

Our motion for acquittal should have been sustained because the Government failed utterly to prove that the whiskey being transported by Mr. Daniel was not accompanied by a permit.

(c)

The findings, verdict, and judgment of the Court are not based on evidence, but rest upon inference based on inference and presumption based on presumption.

SUMMARY OF ARGUMENT

I.

The Court erred, in admitting, over the objections of the defendant, evidence of statements alleged to have been made by the defendant concerning a load of whiskey supposedly purchased by him at Alton, Illinois, about November 15, 1939, and supposedly taken by him to Houston, Texas, and supposedly consumed there by the defendant and his sister-in-law, said evidence being incompetent, irrelevant and prejudicial.

Gart v. *United States,*
294 Fed. 66, l. c. 67-68;
Neff v. *United States,*
105 Fed. (2d) 688;
Hall v. *United States,*
(Ninth Cir.) 235 Fed. 869, 870, l. c. 691-692.

II.

The findings, verdict, and judgment are not supported by the Record.

(a)

All of the substantial evidence is as consistent with innocence as with guilt, and it was the duty of the trial court to sustain the motion for acquittal.

General Statutes of Kansas, 1935,
Section 21-2185;

Harrison v. *United States,*
200 Fed. Rep. 662;
Oras et al v. *United States,*
67 F. (2d) 463.

(b)

Our motion for acquittal should have been sustained because the Government failed utterly to prove that the whiskey being transported by Mr. Daniel was not accompanied by a permit.

Laws of Kansas, 1939,
Chapter 179.

(c)

The findings, verdict, and judgment of the Court are not based on evidence, but rest only upon inference based on inference and presumption based on presumption.

General Statutes of Kansas, 1935,
Section 21-2185.

ARGUMENT

I.

The Court erred, in admitting, over the objections of the defendant, evidence of statements alleged to have been made by the defendant concerning a load of whiskey supposedly purchased by him at Alton, Illinois, about November 15, 1939, and supposedly taken by him to Houston, Texas, and supposedly consumed there by the defendant and his sister-in-law, said evidence being incompetent, irrelevant and prejudicial.

Since the defendant was charged with an attempt to commit a crime, it was of prime importance that the Government prove the criminal intent with which Mr. Daniel was transporting the liquor on the date of his arrest. The Government could offer no direct proof on this point for Mr. Daniel stated that he was taking the liquor to Texas and denied that he was taking it to Kansas. So the Government's attempt to prove the criminal intent was limited to circumstantial evidence, and in trying to bolster its case the following testimony, given by the highway patrolman who arrested Mr. Daniel, was received over our objections (Case 12,120, R. 10):

> "and he did state further in that conversation that he had made another trip once before with a similar load, had taken it back to Texas to his sister about a week or something, a few days before and used it for their own consumption."

Also over our objection, Mrs. Reece, the defendant's sister-in-law, who lived at Houston, Texas, was permitted

to testify that Mr. Daniel never brought any liquor to her house (R. 29).

We objected that all evidence touching this load of whiskey taken to Texas by the defendant at least a week previous to the date of his arrest was incompetent, irrelevant, immaterial and prejudicial. The court overruled our objections and allowed exceptions, holding that the evidence was competent and stating frankly that he considered the evidence damaging and prejudicial to the defendant (R. 24) and the Court held to the same ruling when the motion for new trial was submitted (R. 27), and at the second trial adopted all of the court's oral discussion made at the first trial (Case 12,120, R. 3-4).

The trial judge said:

> "Certainly there can be no question at all that the testimony of the government witnesses as to what the defendant said when he was arrested was competent in evidence against him. The whole statement was a statement which was made at one time and in one connection. The whole statement including that part to which objection is made — was made by the defendant in explanation of the act in the commission of which he was apprehended. He was making the point that this liquor that he was then transporting was about to be transported to Texas, that that was his purpose, that that was his intention, that that was not the first time he had carried liquor to Texas, that he had carried liquor to Texas a short period theretofore; that he had carried that liquor, that is the previous load of liquor, for the same purpose for which he was carrying liquor in the possession of which he was apprehended, namely; he was carrying it for personal consumption by himself and his sister-in-law, and to prove the truth of that statement he said the first load of liquor had been consumed by

himself and his sister-in-law. Of course, that statement was competent; and it was prejudicial, because it made it impossible for the tryer of the fact to believe anything the man had said in his statement; I mean the statement that he and his sister-in-law had consumed in three or four days time fourteen cases of whiskey was so ridiculous and absurd that it threw everything he said into great doubt."

Since the court itself declared that the evidence was prejudicial, it only remains to determine if it was competent or not. If it was competent, no error was committed, of course, in receiving the evidence. If it was incompetent, then prejudicial error is present.

In *Gart* v. *United States*, 294 Fed. 66, the Eighth Circuit said, l. c. 67-68:

> "The rule which should apply to this case, has been clearly stated by Judge Sanborn, of our own circuit, in the case of Paris v. United States, 260 Fed. 529, at page 531, 171 C.C.A. 313, 315, in the following language:
>
> > " 'The general rule is that evidence of the admission by a defendant of an offense similar to that for the alleged commission of which he is on trial is not admissible to prove his commission of the latter offense. Boyd v. United States, 142 U. S. 454, 456, 457, 458, 12 Sup. Ct. 292, 35 L. Ed. 1077; Hall v. United States, 150 U. S. 76, 81, 82, 14 Sup. Ct. 22, 37 L. Ed. 1003; 16 C. J. 586, Sec. 1132. To this general rule there are exceptions. One of them is that, where the criminal intent of the defendant is indispensable to the proof of the offense, proof of his commission of other like offenses at about the same time that he is charged with the commission of the offense for which he is on trial may be received to

prove that his act or acts were not innocent or mistaken, but constitute an intentional violation of the law. In cases falling under such an exception to the rule, however, it is essential to the admissibility of evidence of another distinct offense that the proof of the latter offense be plain, clear, and conclusive. Evidence of a vague and uncertain character regarding such an alleged offense is never admissible. Baxter v. State, 91 Ohio St. 167, 110 N. T. 456; State v. Hude, 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191; 16 C. J. 592; People v. Sharp, 107 N. Y. 427, 469, 14 N. E. 319, 1 Am. St. Rep. 851; State v. LaPage, 57 N. H. 245, 259, 24 Am. St. Rep. 69; Fish v. United States, 215 Fed. 545, 549, 132 C.C.A. 56, L.R.A. 1915A, 809. Such evidence tends to draw the attention of the jury away from a consideration of the real issues on trial, to fasten it upon other questions, and to lead them unconsciously to render their verdict in accordance with their views on false issues rather than on the true issues on trial. Speaking of evidence of other similar offenses, the Circuit Court of Appeals of the First Circuit, in the case last cited, well said:

> " ' "Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused, and should be received, if at all, only in a plain case." ' "

This rule has been many times restated. In *Neff* v. *United States,* 105 Fed. (2d) 688, the opinion quotes from *Hall* v. *United States,* 9 Cir., 235 Fed. 869, 870, l. c. 691-692:

" 'The intent and disposition with which one does a particular act must be ascertained from his

acts and declarations before and at the time; and when a previous act indicates an existing purpose, which from known rules of human conduct may fairly be presumed to continue and control the defendant in the doing of the act in question, it is admissible in evidence. In many cases it is the only way in which criminal intent can be proved; and the evidence is not to be rejected because it might also prove another crime against the defendant. The practical limit to its admission is that it must be sufficiently significant in character, and sufficiently near in point of time, to afford a presumption that the element sought to be established existed at the time of the commission of the offense charged. The limit is largely in the discretion of the judge.'

"To come within the exception the act or offense testified to must be similar in character to, and closely connected with, the offense charged.

" 'There must appear, between the extraneous crime offered in evidence and the crime of which the defendant is accused, some other real connection, beyond the allegation that they have both sprung from the same vicious disposition.' State v. Raymond, 53 N. J. L. 260, 21 A. 328, 330; Chitwood v. United States, 8 Cir. 153 F. 551, 11 Ann. Cas. 814; Prettyman et al v. United States, 6 Cir., 180 F. 30; Colt v. United States, 8 Cir., 190 F. 305; Minner v. United States, 10 Cir., 57 F. (2d) 506."

But the evidence offered by the Government concerning the previous load of whiskey falls far short of the requirements of the rule for many reasons, among which we enumerate the following:

(1) There is no direct proof that the previous load of whiskey was transported into Kansas by the defendant.

(2) The Record is entirely devoid of proof that Mr. Daniel was in the state of Kansas at any time from the date of purchase of the previous load of whiskey to and including the date of his arrest, so there is no evidence in the Record from which it can be even remotely inferred that the previous load of whiskey was transported by Mr. Daniel to Kansas.

(3) There is no proof in the Record that Mr. Daniel transgressed any law in purchasing and transporting the previous load of whiskey.

(4) The fact, if it be a fact, that the previous load of whiskey purchased by Mr. Daniel did not reach Texas does not prove that it was taken into the state of Kansas, nor will this be inferred in the absence of clear proof to the contrary, for there is a presumption of innocence thrown about the defendant's transactions with the previous load of whiskey which can only be overcome by evidence rebutting it. There is no such evidence in this Record.

(5) If we concede, but only for the purpose of this argument, that Mr. Daniel lied to the state highway patrolman regarding the destination and disposition of the previous load of liquor, that of itself does not prove that the previous load of liquor was taken into Kansas and furnishes no basis from which such fact may be inferred.

In *Gart* v. *United States, supra,* the defendant was charged with the unlawful sale of narcotics upon the streets of Denver. Evidence was introduced by the Government which tended to show that, at a different time and place upon a street in Denver, the defendant delivered a package to another party. This testimony was objected

to. The Government failed to prove by any testimony what the package so delivered contained. The defendant's motion to strike the testimony was denied by the trial court and proper exception taken. The court said, l. c. 67:

> "It must be apparent that such a line of testimony if not properly admissible would be highly prejudicial. Standing as evidence before the jury, it might easily lead them to the conclusion that the defendant was in the habit of making sales of narcotics on the streets by delivering packages containing the drug to persons indiscriminately, and yet there was no proof that the package so testified as having been delivered by the defendant at a time and place not charged in the indictment contained narcotic drugs. This left the matter in the nature of a mere suspicious circumstance, which not having been taken from the jury by the trial court left it with them for consideration.
>
> "The scope and purpose of testimony concerning similar offenses is limited, as has been laid down in the Supreme Court of the United States in the cases of Boyd v. United States, 142 U. S. 454, 12 Sup. Ct. 292, 35 L. Ed. 1033. Only in exceptional cases is the proof of such transactions admissible. Where a case falls within the exception, the proof must be clear and convincing. It will be unnecessary to discuss the point in this case as to whether or not this line of testimony fell within the exception to the general rule governing the proof of similar offenses, for the reason that in the case at bar we have no proof of an offense, but merely proof of a suspicious circumstance."

The reasoning of this Court in the case just quoted fits the case at bar like a glove. The evidence concerning

the previous load of whiskey neither proved nor tended to prove any crime and shed no light on the question of intent and was merely a suspicious circumstance which sorely prejudiced the defendant before the trial court. The trial judge said so himself, and he drew inferences from the testimony on which the conviction was based, and the Eighth Circuit draws the same inferences in its opinion, yet the Eighth Circuit said that the testimony was not prejudicial to the tryer of fact. The Eighth Circuit is wrong. Since the trial judge himself said that the testimony was prejudicial, it was the duty of the Eighth Circuit to weigh the competency of the testimony complained of. It failed so to do.

We respectfully urge that the testimony was incompetent under the weight of all authority, and that it is the duty of this Court to declare that in such situations the trial court and the appellate courts must weigh the competency of evidence where prejudice is shown, even though there has been a waiver of trial by jury. A sound public policy and the protection of the individual citizen in his rights so demand.

II.

The findings, verdict, and judgment are not supported by the Record.

(a)

All of the substantial evidence is as consistent with innocence as with guilt, and it was the duty of the trial court to sustain the motion for acquittal.

All of the substantial evidence in the Record shows a state of facts as fully consistent with the hypothesis of innocence as with that of guilt. In support of this statement we point to the following facts:

(1) At the time of his arrest Mr. Daniel was apprehended traveling in a southerly direction on U. S. Highway No. 71 by-pass, about 4 miles south of its intersection with U. S. Highway No. 50. He said he was on his way to Texas. The court will take judicial notice as did the trial court that U. S. Highway No. 71 by-pass runs into and joins Highway No. 71 and proceeds south through Missouri into Arkansas, and the court will take judicial notice that Highway No. 71 does not lead into Kansas.

(2) The court will take judicial notice as did the trial court, that U. S. Highway No. 50 runs directly to Emporia, Kansas, where the Government contends Mr. Daniel was taking the whiskey. The undisputed evidence is that he was already 4 miles south of Highway 50, proceeding in a southerly direction, when apprehended.

(3) The court will take judicial notice that travelers proceeding south on Highway 71 can reach Texas following the usual and normal routes without entering any state affected by the Liquor Enforcement Act of 1936, that is, any state which prohibits the transportation of liquor, and the court will take judicial notice that it was legal and lawful for Mr. Daniel to transport liquor through Missouri, Arkansas, Louisiana and Texas.

(4) The court will take judicial notice that under *Section 21-2185 of the General Statutes of Kansas, 1935,* which section is reprinted for the convenience of the court

in an appendix to this Brief, it is lawful to transport liquor across Kansas in interstate transportation; that it is not necessary to obtain a permit for such transportation before the liquor actually reaches Kansas; that it is only necessary that the driver of a vehicle containing liquor to be transported across Kansas, stop at a port of entry, have the liquor sealed, and declare the route to be pursued by him across Kansas, and then proceed without obtaining any permit, so that it would have been lawful for Mr. Daniel to have entered Kansas with the load of liquor he was transporting to Texas.

The Government proved by its own witness (R. 20) that some three weeks before his arrest Mr. Daniel had declared his intention of going into the liquor business at Houston, Texas. He had purchased a liquor stamp at that place (R. 29). He had bought Texas license plates for his car (R. 20). He was on his way to Texas.

These facts all tend to prove that Mr. Daniel was on his way to Texas. These are the same facts which the Government contends prove he was on his way to Kansas.

Omitting the incompetent testimony discussed in the preceding section of this Brief, any tryer of fact would be compelled to the conclusion, on this Record, as a matter of law, that Mr. Daniel was actually on his way to Texas when apprehended. But even if we consider the incompetent evidence, yet all the evidence in this Record, as a matter of law, is as consistent with the hypothesis of innocence as with guilt, and it does not exclude the hypothesis of innocence as a matter of law, and so the opinion of the Eighth Circuit is in conflict with the ruling of the Sixth Circuit in *Harrison* v. *United States*, 200 Fed. Rep. 662, and the opinion of the Eighth Circuit conflicts

with that of the Ninth Circuit in *Oras et al* v. *United States,* 67 F. (2d) 463, in not rejecting the incompetent evidence in determining if there was sufficient substantial evidence to sustain the conviction.

(b)

Our motion for acquittal should have been sustained because the Government failed utterly to prove that the whiskey being transported by Mr. Daniel was not accompanied by a permit.

At the time Mr. Daniel was apprehended by the state highway patrolman, he was taken into custody and taken to the state highway patrol headquarters at Lee's Summit (R. 10), and agents of the Internal Revenue Department were called and took charge of the liquor and brought it to Kansas City and placed it in storage in the government warehouse (R. 15). The state highway patrolman testified as to certain documents in Mr. Daniel's possession at the time of his arrest (R. 11) which were placed in evidence by the Government (R. 13); these documents are described at pages 29-33 of the Record.

Nowhere does it appear that these were the only documents in Mr. Daniel's possession, or that they were all the documents in Mr. Daniel's possession, and nowhere does it appear that the liquor was not in fact accompanied by the permit described by *Chapter 179 of the Laws of Kansas, 1939,* which provides for the importation of intoxicating liquor into the state of Kansas by permit.

This is a criminal proceeding and it is incumbent upon the Government to prove every element of the crime charged. The indictment on which Mr. Daniel was

tried charges that the liquor was not then and there accompanied by any permit or license therefor as required by Laws of Kansas (R. 2). The failure to obtain a permit and affix it to the liquor package is an essential element of the crime charged and must be proved by positive evidence. It was susceptible of ready proof by positive evidence since the Government had seized the liquor which was being transported by Mr. Daniel and yet had it in its possession at the time of the trial.

The court erred in failing to sustain our motion for acquittal since the evidence was insufficient to sustain a conviction, especially as to this necessary element.

(c)

The findings, verdict, and judgment of the Court are not based on evidence, but rest only upon inference based on inference and presumption based on presumption.

On this Record, to find the defendant guilty of the crime charged, the verdict and judgment can only be based on inference built on inference, and presumption built on presumption. This is true because the Record as it stands, plus only permissible inferences, does not warrant a conviction. To reach a judgment of guilt, on this Record, it is necessary that these mental processes occur:

(a) We find that the defendant lied when he said he did take the previous load of whiskey to Texas. (This is an uncertainty because it was not shown that he did not in fact take the previous load of whiskey to Texas.)

(b) Since we have found that the defendant lied about the previous load of whiskey, we infer that he was

lying about the destination of the load of liquor in his car at the time of his arrest. (This is also an uncertainty.)

(c) Since we have found that the defendant lied about the previous load of whiskey, and have found that he was lying about the destination of the cargo of whiskey in his car at the time of his arrest, we infer that he was taking this last load of liquor into Kansas. (This is also an uncertainty.)

(d) Since we have found that the defendant lied and have inferred that he was taking the liquor into Kansas, in order to convict him we must further infer that at some point, after he had passed the place at which he was apprehended, he would turn to his right toward the direction of Kansas and actually enter it. (This is also an uncertainty.)

(e) Since we have found that the defendant lied about going to Texas, and have inferred that he was going to Kansas, and have inferred that he was going to turn onto some road which leads into Kansas, in order to convict him of the crime, we must further infer that he would seek to enter Kansas on a road which had no port of entry, or that if he did enter Kansas on a road which did have a port of entry on it, that he would either fail to declare his load of liquor and have it sealed, and declare his route, and later deviate from his route, or that he would attempt to sneak past the port of entry without any declaration. (These are all uncertainties.)

In our statement of the case and in our statement of the facts and permissible inferences above made, we have sought to include every element of proof offered at the trial by the Government. We invite the Government

to make whatever legitimate inference it may to begin with, from the facts in evidence, and then demonstrate or show that a verdict of guilty can be reached without using all of the inferences based on inferences which we have pointed out above.

No permit for the transportation of liquor across Kansas is required or can be obtained until a port of entry is reached (see appendix), and had Daniel actually entered Kansas with the liquor, on a road leading to a port of entry, the law would presume that he was doing so with a legal intent, and that he would stop at a port of entry as required by law, and this presumption continues and holds until substantial evidence to the contrary appears. There was no such evidence.

Inferences built on inferences and presumptions on presumptions are not substantial evidence, and since there is no substantial evidence in the Record it is the duty of this Court to reverse the judgment.

CONCLUSION

Today, when millions offer to die that liberty may live, it is more important than ever to safeguard the liberty of the individual, and we humbly urge that it is still the duty of this Court, confronted as it is by a deluge of important litigation brought about by the stress of economic change and emergency, to heed and consider the just complaints of the lowliest. Mr. Daniel was convicted of a misdemeanor, but he was denied a fair trial in accordance with authority, and the principles for which he here contends are important not only to himself, but to every liberty-loving citizen, and we ask that this Honor-

able Court grant the writ prayed for so that the matters complained of may be fully briefed, argued and determined, and justice done.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX

Section 21-2185, General Statutes of Kansas, 1935:

"TRANSPORTATION OF LIQUORS ACROSS STATE; PORT OF ENTRY; INSPECTION AND SEALING; FEE. It shall be unlawful for any person, firm or corporation to transport, carry or convey across the state of Kansas by motor truck or other motor vehicle or have in his or its possession any intoxicating liquor intended to be transported, carried or conveyed across the state of Kansas in interstate commerce unless such person, firm or corporation shall have first entered the state of Kansas at a regularly established port of entry and have said cargo of intoxicating liquor duly inspected and sealed by the officer in charge of said port of entry and shall declare in writing to said officer in charge of said port of entry the kind and quantity of said intoxicating liquor, the name of the owner thereof, the name of the consignor and the name of the consignee, the route of travel across the state of Kansas as designated by the said officer in charge of said port of entry, the port of exit from the state of Kansas, the description of the vehicle transporting, carrying or conveying said intoxicating liquor, the name of the driver, and the person in charge thereof, and shall continue on said route of travel without unnecessary delay until said cargo of intoxicating liquor has reached the said port of exit from the state of Kansas with unbroken seals and with the same kind and quantity of intoxicating liquor which entered the state of Kansas at the original port of entry, and have said cargo duly inspected and checked by the officer in charge of said port of exit. The person in

charge of such port of entry shall charge and collect a fee of $2.50 upon the sealing and unsealing, respectively, of such cargo, said fees to be in addition to all other fees and charges against such carrier. (L. 1935, ch. 159, #2; April 1.)"

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No. 123

In the Supreme Court of the United States

OCTOBER TERM, 1942

BERNARD H. DANIEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals (No. 12120, R. 19–22) [1] is reported at 127 F. (2d) 1.

[1] The record before this Court consists of the record on a prior appeal (circuit court of appeals case No. 11846) which resulted in a reversal and remand on suggestion of error by the Government (No. 12120, R. 2), and the record of the proceedings on retrial (No. 12120). At the second trial the record on the first appeal was by stipulation offered in evidence, and the case was submitted on that record together with some additional evidence (*id.* 3, 9–10). On the second appeal the court below permitted petitioner to use the record on the former appeal without including it in the record of the retrial (*id.* 16–17). In accordance with the method of citation used by petitioner (Pet. 2) the letter "R." is used to designate the record in No. 11846. References to the record on the second appeal (No. 12120) are specifically noted.

JURISDICTION

The judgment of the circuit court of appeals was entered April 15, 1942 (No. 12120, R. 22), and a petition for rehearing (*id.* 23–25) was denied May 7, 1942 (*id.* 27). The petition for a writ of certiorari was filed June 6, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether false statements made by an accused at the time of his arrest to explain suspicious circumstances are admissible in evidence against him to show guilty knowledge.

2. Whether petitioner's conviction was supported by substantial evidence.

STATUTE INVOLVED

Section 3 (a) of the Liquor Enforcement Act of 1936 (Act of June 25, 1936, c. 815, 49 Stat. 1928, 27 U. S. C. 223 (a)) provides as follows:

> Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in

so doing, shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such State; or (2) if all importation, bringing, or transportation of intoxicating liquor into such State is prohibited by the laws thereof; be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT

On May 8, 1940, an information was filed in the District Court for the Western District of Missouri charging that petitioner knowingly and wilfully attempted to transport intoxicating liquor containing more than 4 per cent alcohol by volume from Missouri into Kansas, in which state the sale of such liquor is prohibited, in violation of the Liquor Enforcement Act of 1936 (*supra,* pp. 2–3) (R. 1–2). The case was tried by the court without a jury (Pet. 2). Petitioner was found guilty, given a six-month jail term, and ordered to pay a $500 fine (R. 4–5).

On appeal the Government suggested error,[2] and the court below accordingly reversed the convic-

[2] In the interim pending the appeal the court below held in *Arnold* v. *United States*, 115 F. (2d) 523, and *Gregg* v. *United States*, 116 F. (2d) 609, that in view of the variance between the provisions of the Kansas liquor legislation which define as intoxicating and prohibit the sale of liquor containing more than 3.2 per cent alcohol by weight (G. S. Kan. (Corrick 1939 Supp), c. 21, art. 21, secs. 2109, 2109a; G. S. Kan. (Corrick 1935), c. 21, art. 21, sec. 2101), and the prohi-

tion and remanded the cause for further proceedings (No. 12120, R. 2–3). At the second trial before the court without a jury (*id.* 4) the record of the first trial was by stipulation offered in evidence, and the case was submitted on that record (*id.* 3, 9–10). The only additional evidence presented was the testimony of a chemist that liquids containing 3.2 per cent alcohol by weight are equivalent in alcoholic content to liquids containing 4 per cent alcohol by volume (*id.* 10). Petitioner was again found guilty (*id.* 4) and received the same sentence as previously imposed (*id.* 5–6). On the second appeal the conviction was affirmed (*id.* 22).

The evidence adduced by the Government may be summarized as follows:

On November 23, 1939, petitioner was arrested for reckless driving by an officer of the Missouri Highway Patrol at a point a few miles south

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bition of the federal Liquor Enforcement Act of 1936 against transportation of intoxicating liquor into any state in which sales of intoxicating liquor containing more than 4 per cent alcohol by volume are prohibited, and in the absence of proof as to the equivalence of the two standards of measurement, it could not say that the federal statute applied to Kansas. It was because of these decisions and the absence of such proof at the first trial of petitioner that the Government suggested error (No. 12120, R. 2–3, 15). In its later decisions in *Dolloff* v. *United States*, 121 F. (2d) 157, certiorari denied, 314 U. S. 626, and *Flippin* v. *United States*, 121 F. (2d) 742, certiorari denied, 314 U. S. 677, the court below held upon the basis of evidence and recognized scientific authorities that the two standards of measurement are substantially identical and, accordingly, that the federal act applies to Kansas.

of Lees Summit, Missouri. At the time of the arrest petitioner was traveling south on U. S. Highway 71 by-pass, which borders Kansas City, Missouri. (R. 9–10.) Texas license plates were on the car, and petitioner showed the officer a Texas driver's license issued November 2, 1939, and bearing a Houston, Texas, address (R. 10, 33). Fifteen cases of liquor were in the rear of the car (R. 10–11, 15). Petitioner was taken to patrol headquarters in Lees Summit and, on being asked for further identification, exhibited a Kansas driver's license and a Kansas automobile registration for his car, both bearing an address in Emporia, Kansas (R. 10, 32, 33). He also produced a special tax stamp issued by the collector for the first district of Texas to petitioner as a retail liquor dealer for a period commencing Nov, ember 1, 1939; the stamp carried a Houston, Texas, address (R. 10, 29). Petitioner had in his possession an invoice for the liquor, disclosing that it had been purchased from the Country Club Distributing Company in Alton, Illinois, and giving petitioner's name as purchaser and Houston as his address (R. 11, 29). Petitioner explained to the state officers that he had purchased the liquor in Alton and was taking it to Houston, where he and his sister-in-law were to consume it, and that a week previously he had carried from Alton to Houston on a similar load of liquor which he and his sister-in-law had consumed. Petitioner, the car, and the liquor were thereupon turned over to officers of the United States Alco-

hol Tax Unit. (R. 12.) Kansas license plates were found in the car (R. 21–22). Petitioner told one of the federal officers that he and his sister-in-law, Mrs. Frankie Reece, had "chipped in together and brought this liquor and was consuming it" (R. 13), and that "they had consumed twelve cases in about a week's time, and that he was going back with fifteen more" (R. 15). Asked why he had bought a special retailer's tax stamp in Texas if he was going to consume the liquor, petitioner replied that he "just wanted one" (R. 14). When another of the federal officers expressed disbelief in petitioner's story and suggested that it would be better for him to tell the truth, petitioner replied that "it probably would be better to tell the truth, and that a lie would just get him into trouble, but he had to have some story, and that one story was about as good as another" (R. 15).

Besides petitioner's possession of a Kansas driver's license and automobile registration, both listing an Emporia, Kansas, address, there was other undisputed evidence that petitioner was living there at the time of his arrest. The chief clerk to the superintendent of the Santa Fe Railroad Company at Emporia testified that petitioner was employed by that company and had given his Emporia address as the residence address where he was subject to call up to July 25, 1940, when he substituted a North Kansas City address, and

that he had never given Houston, Texas, as his address (R. 16–17). The sheriff at Emporia testified that he had known petitioner for approximately two years prior to the first trial; that during this period petitioner lived in Emporia; that he had collected personal taxes from petitioner in November 1939; and that petitioner, his wife, and children continued to reside in Emporia for a couple of months following his arrest. The cashier of an Emporia bank testified that petitioner had negotiated a loan on November 17, 1939, a week prior to his arrest, and had given a mortgage on certain livestock, hogs, and cattle located on a farm near Emporia. (R. 17.) A neighbor testified that petitioner lived across the street from him in Emporia for several years prior to February 1940. There was similar testimony by petitioner's landlady. (R. 18.)

Mrs. Frankie Reece, petitioner's sister-in-law, was called as a witness for the Government and testified that she lived in Houston, Texas, and that petitioner and his wife visited her once or twice in the fall of 1939 for a few days; that petitioner told her at that time that he thought the liquor business in Houston was good and that he might try to locate there; that petitioner bought a retail liquor dealer's tax stamp and was to stay at her house if he opened up a liquor business; that petitioner never brought any liquor to her house; that

she never contributed toward the purchase of any liquor; and that no liquor business was ever conducted at her home (R. 19–20).

Petitioner did not testify and only one witness was called in his behalf (R. 21).[3]

ARGUMENT

1. Petitioner complains (Pet. 4, 12, 16–23) that the testimony of the arresting officers concerning his statements that a week prior to his arrest he had purchased another load of approximately a dozen cases of whiskey in Alton, Illinois, and taken it to Houston, Texas, where he and his sister-in-law had consumed it, was incompetent and prejudicial and should have been excluded. We think the argument is based on a misconception of the applicable rule of evidence.[4] The statements com-

[3] The testimony of this witness is omitted from the bill of exceptions as "not material to appeal" (R. 21).

[4] The familiar rule that proof of the commission of another crime by the accused is inadmissible, and the equally familiar exception to the rule which permits evidence of another offense of a similar nature to show intent, are entirely irrelevant. The Government did not attempt to show or even suggest that petitioner had previously committed another similar offense. If the statements complained of were true, it is clear that no previous crime was committed, since it is not a crime to transport liquor to Texas. And if the statements were false, no inference one way or another could have arisen as to any previous crime. Hence the cases cited and extensively quoted in petitioner's brief (Pet. 18–20)

plained of were self-serving declarations of petitioner designed to give an innocent explanation of the presence of the liquor in his car. It is well established that self-serving statements made by a defendant out of court, explaining suspicious circumstances, may be proved against him and their falsity then be shown. The fact of their falsity admits them as indicating guilty knowledge and an attempt to explain away incriminating circumstances by falsehoods. *Wilson* v. *United States*, 162 U. S. 613, 620–621; *Halbert* v. *United States*, 290 Fed. 765, 768 (C. C. A. 6).[5] The falsity of

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which discuss the rule and the exception referred to are not in point.

Gart v. *United States*, 294 Fed. 66 (C. C. A. 8), cited by petitioner for the proposition that proof of a "suspicious circumstance" is inadmissible (Pet. 21–23), is equally inapposite. The evidence in question in that case did not consist of statements made by the accused, but of outside proof of an extraneous act which the court characterized as "merely proof of a suspicious circumstance" in no way connected with the offense charged (p. 67).

[5] See also *People* v. *Martin*, 16 Cal. App. (2d) 515, 517 (1936); *Mora* v. *People*, 19 Colo. 255, 260–262 (1893); *Roberts* v. *State*, 25 Del. 385, 389 (Sup. Ct. 1911); *Smith* v. *State*, 29 Fla. 408, 422–423 (1892); *State* v. *Hayes*, 162 La. 310, 314 (1926); *People* v. *Minchella*, 218 Mich. 517, 519–520 (1922); *State* v. *Robinson*, 117 Mo. 649, 664 (1893); *State* v. *Bishop*, 98 N. C. 773, 775 (1887); *State* v. *Jennings*, 48 Ore. 483, 492–493 (1906); *Commonwealth* v. *Dumber*, 69 Pa. Super. 196, 199–200 (1918). And see 4 Wigmore, *Evidence* (3rd ed. 1940), secs. 1048, 1052, 1060a.

petitioner's statements was clear both from their own intrinsic improbability and from the testimony of his sister-in-law (*supra,* pp. 7–8). Consequently, the evidence of the statements would have been admissible as giving rise to a legitimate inference of guilt even if the case had been tried before a jury.

2. Petitioner contends that all the competent evidence was as consistent with innocence as with guilt and that the trial court therefore should have sustained his motion for acquittal (Pet. 4, 12–13, 23–26, 27–29). But, as the court below held (No. 12120, R. 19–22), even apart from the evidence of petitioner's statements to the officers regarding the transportation of another load of liquor to Houston, Texas, a week previously, there was ample proof to sustain the conviction. The evidence, summarized in the Statement (*supra*, pp. 4–8), and the inferences reasonably deducible from it indicate that petitioner, after having purchased the liquor at Alton, Illinois, had driven west across the state of Missouri almost to the Kansas line and then turned south (see No. 12120, R. 19–20). When he was arrested a few miles south of Lees Summit, Missouri, he was traveling a route which, if he made appropriate turns, would take him to Emporia, Kansas (see R. 27–28), where he lived with

his family and was employed.[6] Although his car bore Texas license plates and he had a Texas driver's license, he also had a Kansas driver's license and Kansas plates were found inside his car. While he had visited his sister-in-law in Houston on prior occasions and was possibly planning to move there, he did not live there at the time of his arrest. His procurement of a Texas driver's license and Texas license plates and his purchase of a retail liquor dealer's tax stamp on one of his visits to Houston could very reasonably have been regarded as precautionary measures designed to establish his innocence in the event he should subsequently be apprehended attempting to import liquor into Kansas.[7] This evidence in itself was sufficient to justify the conviction. And when considered together with petitoner's explanation to the officers that he was taking the liquor to

[6] While the route petitioner was following would have taken him to Texas if he kept traveling south (see R. 23), this fact loses significance when it is observed, as the court below pointed out (No. 12120, R. 21–22), that "Lees Summit, Missouri, is a long way from any reasonably direct route from Alton, Illinois, to Houston, Texas. One who was transporting liquor from Alton to Houston would hardly go by way of Lees Summit."

[7] Both the district court and the circuit court of appeals branded these measures as "camouflage" (R. 24; No. 12120, R. 22). Cf. *Gregg* v. *United States*, 113 F. (2d) 687, 689, 690 (C. C. A. 8), where a similar scheme was adopted.

Houston for personal consumption by himself and his sister-in-law, which the court below characterized as "absurd" (No. 12120, R. 22), and his further statement that he "had to have some story, and that one story was about as good as another" (R. 15), the evidence of his guilt was virtually conclusive.[8]

CONCLUSION

The case was correctly decided below, and there is neither conflict of decisions nor any question of

[8] Petitioner's contention (Pet. 4, 12, 26–27) that his motion for acquittal should have been sustained because the Government failed to prove that the liquor he was transporting was not accompanied by a permit, as charged in the information, was not specifically raised at the trial or in the assignment of errors (see No. 12120, R. 8–9) and was not discussed in the opinion of the court below. We assume, however, that the point was saved by the motion for acquittal and the general assignment that the evidence was insufficient, but we think that the contention is without merit. It was a legitimate inference from the Government's uncontradicted evidence that petitioner was attempting to transport intoxicating liquor into Kansas without a permit. The inference is especially clear from petitioner's absurd statement to the officers that he was taking the liquor to Texas for personal consumption; obviously he would not have offered such a tenuous explanation if he in fact had a permit. It is well settled that where there is substantial evidence of guilt, viewing the evidence and all inferences reasonably deducible therefrom most favorably to the Government, the denial of a motion for acquittal or a directed verdict must be sustained. *Glasser* v. *United States*, 315 U. S. 60, 80; *France* v. *United States*, 164 U. S. 676, 681; *Walker* v. *United States*, 93 F. (2d) 383, 392 (C. C. A. 8),

general importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1942.

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certiorari denied, 303 U. S. 644; *Marx* v. *United States*, 86 F. (2d) 245, 250 (C. C. A. 8); *Galatas* v. *United States*, 80 F. (2d) 15, 23 (C. C. A. 8), certiorari denied, 297 U. S. 711; *Smith* v. *United States*, 62 F. (2d) 1061 (App. D. C.); *Zottarelli* v. *United States*, 20 F. (2d) 795, 796 (C. C. A. 6), certiorari denied, 275 U. S. 571; *Duff* v. *United States*, 185 Fed. 101, 102 (C. C. A. 4).

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REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

None of the cases cited by the Government as authority for the proposition that self-serving statements made by a defendant out of court, explaining suspicious circumstances, may be proved against him, are applicable in this case for two reasons. All of those cases deal with prosecutions where the defendant was actually charged with a commission of a crime and not an attempt to commit a crime.

Secondly, in all of those cases the defendant or someone for him took the stand and testified. Neither of

those conditions exist in this prosecution. The petitioner was charged merely with an attempt to commit a crime, and did not take the stand in his own behalf, nor did he offer any testimony at the second trial. (Case 1210, page 10). The Government admits (Footnote 4, page 8) that if the statements complained of by us were false, then an inference arises from which is drawn another inference, leading to belief in the guilt of the defendant. The Government says that if the petitioner made a false statement regarding the destination of his first load of liquor, then it follows that his statements concerning the destination of the load of liquor in his car at the time of his arrest were also false, and that it therefore follows that the petitioner, at some place beyond that point in the road where he was apprehended, would turn to his right and enter the state of Kansas. The fact that the Government rests its case on the presumption which it draws from the evidence complained of, demonstrates how necessary it is to build inference on inference in order to arrive at the guilt of the petitioner.

The Government lays great stress on its statement, which was the statement of the trial court, that the petitioner was not on a direct route between East St. Louis and Houston, Texas when arrested. It is obvious that the Honorable Judge Otis was not familiar with our Missouri roads, nor was the Eighth Circuit. The most direct route from St. Louis to Houston is via U. S. 66 from St. Louis, Missouri to Carthage, Missouri where it joins U. S. 71 which leads to Houston. However, anyone who has ever traveled U. S. 66 from St. Louis to Carthage knows that it traverses the Ozark region of Missouri and that the road twists tortuously almost every foot of the distance between those two towns. Anyone familiar with the Missouri roads knows that both U. S. Highways 40 and 50 lead directly from St. Louis to U. S. Highway

71 over straight roads, and that time can be conserved by taking those highways to reach 71, and we who write this brief have traveled those highways and state that such are the facts.

When arrested Mr. Daniel was about twenty miles east of the Kansas state line and was proceeding in a southerly direction, not toward Kansas. He was suspected of an attempt to commit a crime, and he was charged with attempting to commit a crime, and was convicted on the mere suspicion that he was about to commit a crime.

We all know what it means to be suspected of attempting to commit a crime in Nazi Germany. What does it mean in America? What price does a man pay who is under suspicion of an attempt to commit a misdemeanor, such as Mr. Daniel stands charged with, a misdemeanor which applies to only three out of forty-eight states?

Mr. Daniel was arrested and compelled to stand trial.

His Oldsmobile coupe, worth not less than $500.00, and the whiskey worth about $225.00, were confiscated.

He was found guilty and sentenced to six months imprisonment and a fine of $500.00.

Mr. Daniel is a railroad engineer with twenty years service and seniority. He is now working about fourteen hours of each twenty-four-hour day, being employed by the Santa Fe. If his conviction stands he will be dismissed by the railroad and will lose all of the benefits accruing to him under the railroad retirement act.

Will the Government exact such a penalty because a man is under mere suspicion of an attempt to commit a misdemeanor? Is this the American freedom we are fighting for?

Nowhere in its brief does the Government justify the failure of the Eighth Circuit to pass on the competency of the testimony we challenged. Nowhere in its brief does the Government contend that the courts should not pass on the competency of evidence merely because a jury has been waived. Nowhere in its brief does the Government contend that it is not of general importance that a ruling be had from this Court touching the duties of trial courts and the reception of evidence where juries are waived. Nowhere in its brief does the Government offer any authority against our contention that the record does not sustain a conviction because there was no proof by the Government that the liquor in Mr. Daniel's possession was not accompanied by a permit. Nor is this complaint of ours an after-thought, as the Government's brief would seem to indicate. The exact point was raised and briefed before the Eighth Circuit which failed to rule on the point or even mention it in its opinion.

For all of the foregoing reasons and because we firmly believe that Mr. Daniel is innocent, that he was convicted through the reception of incompetent and prejudicial testimony and because his conviction is not supported by the record but is based entirely on inference built on inference, we respectfully urge and pray that the writ be granted.

Respectfully submitted,

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